MICHAEL ATUN WEE

v.

MALAYSIAN CREDIT FINANCE BERHAD & 4 ORS.

SUPREME COURT, KOTA KINABALU
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR, LP.
TAN SRI DATO' MOHD EUSOFF BIN CHIN, SCJ.
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ.
[CIVIL APPEAL NO. 02-228 OF 1992]
23 SEPTEMBER 1994

LAND LAW: Agreement to develop land - Construction - Registered owners executed Memorandum of Transfer transferring land to developer - Whether a contract of sale of land - Beneficial ownership - Whether retained by registered owners.

LAND LAW: Prohibitory Orders - Validity - Registered owners executed Memorandum of Transfer transferring land - Judgment creditors of transferee lodged Prohibitory Orders against land -Whether Prohibitory Orders wrongly registered - Whether transferee acquired legal and beneficial interest in land - Auction sale thereof - Whether null and void.

LAND LAW: Auction sale - Order of confirmation of sale issued - Application to set aside order of sale not made - Whether order of confirmation of sale became absolute - Order 47 r.7 Rules of the High Court, 1980.

LAW OF TRUST: Agreement to develop land - Registered owners executed Memorandum of Transfer transferring land to developer - Trust relationship - Whether existed - Whether agreement created only contractual relationship - "Bare trust" principle - Whether applicable.

The appellant and five others were the registered co-owners of one part of a piece of land in Keningau, Sabah. In 1980 they entered into an agreement with one Dunstan, since deceased, for the latter to develop the land for commercial purpose on certain terms and conditions. One of the conditions, incorporated in clause 11 of the agreement, stipulated that upon the issue of the sub-divided title of the land, Dunstan would transfer the "hotel lot" back to the co-owners. The co-owners, in consideration of the terms and conditions aforesaid, meanwhile, executed a Memorandum of Transfer by which they transferred the land to Dunstan.

On the strength of the aforesaid transfer, Dunstan's company obtained a loan from Bank Bumiputra Malaysia Berhad, the second respondent (the bank), for which Dunstan stood guarantor. In 1985 the bank obtained a default judgment against Dunstan in respect of the loan and thereafter the bank lodged a Prohibitory Order against the land. Meanwhile, a like Prohibitory Order was also lodged by the 1st respondent. In 1989 the bank took out a Court order to sell the land by public auction and pursuant to that the land was sold to the 3rd, 4th and 5th respondents. On 15 August 1989, an order of confirmation confirming the sale of the property to the purchasers was issued by the Court.

The appellant applied to the High Court for a declaration that despite the aforesaid transactions, he was still the beneficial owner of the land. The appellant contended that clause 11 of the agreement made it manifest that Dunstan was only holding the land as bare trustee for the co-owners, and therefore the Prohibitory Orders could

only be wrongly registered, with the result that the auction sale of the land became null and void. The learned Judge ruled that the appellant, by transferring the land, had divested himself of his rights in favour of Dunstan, who then became the legal owner. In the premises, the learned Judge ruled that the land was adequately seized under the Prohibitory Orders, and hence, was lawfully auctioned.

The appellant appealed to the Supreme Court and the primary issue that arose was whether at the time the Prohibitory Orders were registered by the bank and the first respondent, Dunstan had the legal and equitable interest in the land, or whether he was then only a bare trustee for the co-owners.

Held:

[1] The appellant's claim of being the beneficial owner of the said property under the agreement, which was made on the basis of the existence of a constructive trust, must fail. The appellant had not shown by cogent evidence that a trust relationship between them and Dunstan had existed by reason of the agreement. Clearly by clause 11 of the agreement, the relationship that existed between them was merely contractual in nature and no trust relationship between them in respect of the property was created by the said clause. This being the case, the proper remedy for the owners is to sue the developer for breach of contract or for specific performance.

[2] The "bare trust" principle applies to contract of sale of land and the effect is to alter the relationship of the parties from one of vendor/purchaser to that of trustee/beneficiary. The agreement in this case, however, is not an agreement of sale of land. Rather it is an agreement made between the co-owners of the land and an individual developer for the latter to develop the land on certain terms and conditions and in consideration thereof the co-owners transferred the land to the developer. In the premises, the "bare trust" principle is not applicable to this case.

[3] As the relationship that existed between the parties was only contractual, Dunstan cannot be said to be a constructive trustee for the co-owners. By reason of the agreement and the transfer of the land to Dunstan by the co-owners, Dunstan had clearly retained legal ownership of the land at the time of the registration of the Prohibitory Orders by the first and the second respondents, and this being the case, the subsequent order of sale by public auction granted by the High Court was valid and proper. While it is true that a judgment creditor can only seize and sell what the debtor can lawfully sell, in the circumstances of this case, and for reasons given herein, that argument is unsustainable.

[4] The facts also showed that the appellant had sufficient notice of the existence of the Prohibitory Orders on the issue document of title to the land but had chosen to do nothing then. The logical thing to do, in the face of such notice, was for the appellant to intervene in the proceedings to set aside the Prohibitory Orders or apply for a stay of execution, before the sale was confirmed. Under r.7(g)(i) of O.47 Rules of the High Court, a confirmation of sale becomes absolute unless an application was made under paragraph (e) or (f) or where such application was made or disallowed by the Court. Since no such application was made, this Court could only conclude that the auction sale and the subsequent order of confirmation of the sale were both valid.

[Appeal dismissed].

a **[Bahasa Malaysia** Translation of Headnote**]**

UNDANG-UNDANG TANAH: Perjanjian untuk memaju tanah - Pentafsiran - Pemilik berdaftar menyempurnakan Memorandum Pindah-Milik memindah milik tanah kepada pemaju - Sama ada satu kontrak jual-beli tanah - Pemilikan benefisial - Sama ada dipegangmilik oleh pemilik berdaftar.

b ***UNDANG-UNDANG TANAH: Perintah larangan - Keesahannya - Pemilik berdaftar menyempurnakan Memorandum Pindah-Milik memindah milik tanah - Pemiutang penghakiman penerima pindaan serah-simpan perintah larangan terhadap tanah - Sama ada pendaftaran perintah larangan salah - Sama ada penerima pindaan memperolehi kepentingan di sisi undang-undang dan kepentingan benefisial atas tanah - Jualan lelong tanah tersebut - Sama ada batal dan tak sah.***

c ***UNDANG-UNDANG TANAH: Jualan lelong - Perintah mengesahkan jualan dikeluarkan - Permohonan untuk mengetepikan perintah jualan tidak dibuat - Sama ada perintah mengesahkan jualan menjadi mutlak - Aturan 47 k. 7 Kaedah-kaedah Mahkamah Tinggi 1980.***

d ***UNDANG-UNDANG AMANAH: Perjanjian untuk memaju tanah - Pemilik berdaftar menyempurnakan Memorandum Pindah-Milik memindah milik tanah kepada pemaju - Perhubungan amanah - Sama ada wujud - Sama ada perjanjian hanya mewujudkan perhubungan kontrak - Prinsip "bare trust" - Sama ada boleh dipakai.***

Perayu bersama dengan lima orang yang lain tuan punya bersama berdaftar sebahagian sekeping tanah di Keningau, Sabah. Dalam tahun 1980 mereka menandatangani satu perjanjian dengan Dunstan, simati, untuk membolehkan
e Dunstan memaju tanah tersebut bagi tujuan komersial atas beberapa terma-terma dan syarat-syarat. Salah satu daripada syarat-syarat tersebut, yang di inkorporasi dalam klausa 11 perjanjian itu, mengatakan bahawa atas pengeluaran hakmilik pecah lot tanah tersebut, Dunstan akan pindah milik "hotel lot" kepada tuan punya bersama tanah tersebut. Sebagai balasan terma-terma dan syarat-syarat yang dipersetujui, tuan punya bersama menyempurnakan satu memorandum Pindah-
f Milik dimana tanah tersebut di pindah milik kepada Dunstan.

Berdasarkan pindahmilik tersebut, syarikat kepunyaan Dunstan memperolehi pinjaman daripada Bank Bumiputra Malaysia Berhad, responden kedua (bank tersebut), dimana Dunstan telah menjamin pinjaman tersebut. Dalam tahun 1985 bank tersebut telah memperolehi penghakiman ingkar terhadap Dunstan berhubung dengan pinjaman tersebut dan kemudian serah-simpan perintah larangan terhadap
g tanah tersebut. Pada masa yang sama, responden pertama juga telah serah-simpan perintah larangan terhadap tanah tersebut. Dalam tahun 1989 bank tersebut telah mendapat perintah Mahkamah untuk menjual tanah tersebut secara lelongan awam dan tanah tersebut telah dijual kepada responden ketiga, keempat dan kelima. Pada 15 Ogos 1989, satu perintah Mahkamah mengesahkan jualan tanah tersebut kepada pembeli telah dikeluarkan.

h Perayu membuat satu permohonan kepada Mahkamah Tinggi untuk satu deklarasi bahawa, sungguhpun transaksi-transaksi tersebut telah berlaku, dia masih tuan punya benefisial tanah tersebut. Perayu mengatakan bahawa klausa 11 perjanjian tersebut dengan jelas menunjukkan bahawa Dunstan hanya memegang tanah tersebut sebagai "bare trustee" tuan punya bersama tanah tersebut. Oleh yang

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demikian perintah larangan telah didaftarkan secara salah dan membawa akibat jualan lelong tanah tersebut batal dan tak sah. Hakim yang bijaksana membuat keputusan bahawa perayu, dengan pindahmilik tanah tersebut, telah melepaskan haknya kepada Dunstan, yang menjadi tuan punya di sisi undang-undang. Dalam pada itu, Hakim yang bijaksana memutuskan bahawa tanah tersebut telah diambil secara sah di bawah perintah larangan dan oleh yang demikian di lelong secara sah.

Perayu membuat rayuan kepada Mahkamah Agung dan isu utama yang timbul adalah sama ada pada masa perintah larangan didaftar oleh bank tersebut dan responden pertama, Dunstan mempunyai kepentingan di sisi undang-undang dan kepentingan ekuiti di dalam tanah tersebut, atau sama ada Dunstan hanya seorang "bare trustee" tuan punya bersama tanah tersebut.

Diputuskan:

[1] Dakwaan perayu bahawa dia adalah tuanpunya benefisial tanah tersebut di bawah perjanjian tersebut, dimana dakwaan tersebut dibuat berasaskan wujudnya amanah konstruktif, mesti gagal. Perayu telah gagal menunjukkan keterangan yang meyakinkan bahawa satu perhubungan amanah wujud di antara tuan punya bersama dan Dunstan oleh kerana perjanjian tersebut. Ia adalah jelas bahawa melalui klausa 11 perjanjian tersebut perhubungan di antara mereka adalah hanya perhubungan kontrak dan tiada perhubungan amanah berkaitan tanah tersebut diwujudkan oleh klausa tersebut. Oleh yang demikian remedi yang sesuai adalah bagi tuanpunya tanah tersebut untuk mendakwa pemaju atas kemungkiran kontrak atau untuk pelaksanaan spesifik.

[2] Prinsip "bare trust" memakai kepada kontrak penjualan tanah dan kesannya adalah untuk mengubah perhubungan parti dari penjual/pembeli kepada pemegang amanah/benefisiari. Walaubagaimanapun, perjanjian dalam kes in bukan satu perjanjian untuk jual-beli tanah. Sebaliknya ia adalah satu perjanjian diantara tuan punya bersama tanah dan pemaju individu untuk membolehkan pemaju tersebut memajukan tanah tersebut atas beberapa terma-terma dan syarat-syarat dimana sebagai balasannya tuan punya bersama memindah milik tanah tersebut kepada pemaju. Dalam keadaan sedemikian, prinsip "bare trust" tidak memakai kepada kes ini.

[3] Oleh kerana perhubungan yang wujud di antara kedua-dua pihak hanya perhubungan kontrak, Dunstan tidak boleh dikatakan pemegang amanah konstruktif tuan punya bersama tanah tersebut. Dengan adanya perjanjian dan pindahmilik tanah tersebut kepada Dunstan, ia adalah jelas bahawa Dunstan mengekalkan keempunyaan di sisi undang-undang tanah tersebut semasa perintah larangan oleh responden pertama dan kedua didaftarkan dan oleh yang demikian perintah penjualan melalui lelongan awam yang diberikan oleh Mahkamah Tinggi adalah sah. Walaupun ia benar bahawa pemiutang penghakiman hanya boleh mengambil dan menjual apa yang boleh dijual oleh penghutang secara sah, dalam keadaan kes ini, dan oleh kerana alasan yang diberikan disini, hujah sedemikian tidak dapat dibenarkan.

[4] Fakta kes juga menunjukkan bahawa perayu mempunyai notis tentang wujudnya perintah larangan diatas dokumen hakmilik keluaran tanah tersebut tetapi dia telah membuat pilihan untuk tidak membuat apa-apa pada masa itu. Apa yang wajar dibuat oleh perayu, bila dikemukakan dengan notis tersebut, ialah untuk mencelah dalam prosiding tersebut untuk mengketepikan perintah larangan

atau memohon untuk penggantungan pelaksanaan, sebelum jualan diesahkan. Dibawah A. 47 k. 7(g)(i) Kaedah-Kaedah Mahkamah Tinggi, pengesahan jualan menjadi mutlak melainkan satu permohonan dibuat di bawah perenggan (e) atau (f) atau dimana permohonan dibuat atau ditolak oleh Mahkamah. Oleh kerana permohonan sedemikian tidak dibuat, Mahkamah ini terpaksa memutuskan bahawa jualan lelong dan perintah mengesahkan jualan kedua-duanya sah.

[Rayuan dibuang].

Cases referred to:

Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(refd).***
Chua Hee Hung v. Q.B.E. Supreme Insurance Bhd [1990] 1 MLJ 480 / [1990] 1 CLJ 669 ***(refd).***
Lysaght v. Edwards [1875] 2 Ch D 499, Jessel MR. at p. 506 ***(refd).***
Chang v. Registrar of Titles [1975] 8 ALR 285 ***(refd).***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd).***
Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 FC ***(refd).***
Ker Chee Chuan v. Katlyn Enterprise (M) Sdn. Bhd. [1991] 1 MLJ 98 SC ***(refd)***
Meriam binti Yaacob & Ors. v. Shell Malaysia Trading Sdn. Bhd. [1984] 2 MLJ 31 / [1984] 1 CLJ 227 ***(refd).***
Warmington v. Miller [1973] 1 QB 877 ***(refd).***
Haji Yahaya bin Haji Ahmad & Anor. v. W.E. Perera & Anor. [1977] 1 MLJ 32 ***(refd).***

Legislation referred to:

Rules of High Court O. 44, r. 3(1) , O. 47, r. 7(g) (i)

For the appellant - Nobert Yapp; M/s. Jayasuriya Kah & Co.
For the 1st respondent - Bernard Ho; M/s. Fernandez & Co.
For the 2nd respondent - Philip Lee; M/s. Lee & Aziz
For the 3rd, 4th, and 5th respondents - J.T. Kulai; M/s. J. T. Kulai & Co.

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah SCJ:

This appeal arose from the decision of the High Court Kota Kinabalu given on 27 March 1992 dismissing the plaintiff's application seeking the following reliefs:

1. A declaration that he was at all material times the true legal and beneficial owner of a piece of property held under Keningau Country Lease No: 135320240 (the said property);
2. That the Prohibitory Orders dated 19 May and 3 November 1986 respectively registered on the register document of title to the said property be set aside;
3. That the order for sale of the said property and the subsequent order of confirmation of sale be revoked;
4. Costs.

After hearing Counsel, we dismissed the appeal with costs and indicated that we would give our reasons in due course, which we do so now. The plaintiff and five others were the registered co-owners of one part of a piece of land held under Keningau Native title no. 133031544 (the said land). By a written agreement dated 1 September 1980, they agreed with one Dunstan Dumpangol, deceased, for the latter to develop their part of the said land commercial purposes. It was a term of

the said agreement that Dunstan, at his own cost and expense, would apply to the relevant authority for subdivision of the land and for conversion of land use to commercial purpose to be held under the Country Lease. Clause 11 stipulated that Dunstan shall also transfer the "hotel lot" as indicated in the lay-out plan free from encumbrances to the co-owners as soon as the subdivided title was issued by the relevant authority. In the meantime, in consideration of the terms and conditions of the said agreement, the co-owners executed a Memorandum of Transfer of their part of the said land in favour of Dunstan and on 3 September 1980, Dunstan presented the documents for registration at the Land Registry, Kota Kinabalu.

On 19 August 1985, Bank Bumiputra Malaysia Berhad, the second respondent, obtained judgment in default of appearance against Dunstan in civil suit no. R784 of 1985 on a claim by the bank for the sum of RM4,614,663.58 and a further sum of RM1,303,085.17 with interest and costs given to the principal borrower and guaranteed by Dunstan. On 19 May 1986 and 3 November 1986, both the first and second respondents registered Prohibitory Orders on the issue document of title to the said property for which Dunstan was the registered proprietor. Consequently, on 28 February 1989, the Court granted to the second respondent an order to sell the said property by public auction which was held on 20 May 1989, where the third, fourth and fifth respondents were the successful bidders. Finally, on 15 August 1989, an order of confirmation of the sale of the said property to the third, fourth and fifth respondents was confirmed and the Memorandum of Transfer for the conveyance of transfer of the said property to the purchasers was executed by the Deputy Registrar of the High Court, Kota Kinabalu, on behalf of the estate of Dunstan on 12 November 1990.

It was the plaintiff's case that he was at all material times the beneficial owner of the said property and the two Prohibitory Orders had been wrongly registered on the issue document of title to the said property, resulting in the auction sale of the said property at the instance of the bank being null and void. In asserting his claim as the beneficial owner of the said property, the plaintiff relied mainly on clause 11 of the said agreement. He also relied on the undated Memorandum of Transfer (MAW1) purportedly to have been executed by Dunstan, as transferor, in favour of the plaintiff and one Ali Hassan bin Omar; a letter dated 5 June 1984 (MAW5) from the solicitors confirming that they had prepared the transfer documents of the said property for the execution of the co-owners and suggesting that RM10,000 be inserted in the forms as the consideration, and, lastly, a letter dated 24 September 1984 (MAW2) signed by Ali Hassan bin Omar relinquishing his right of ownership and title of the said property to the plaintiff. It was submitted on his behalf that notwithstanding the transfer of the legal ownership of the said land to Dunstan after the execution of the said agreement, it was the manifest intention of the contracting parties under clause 11 that Dunstan was to hold the said land as a trustee for the co-owners pending the retransfer of the "hotel lot" to the co-owners upon the issue of subdivided title to the said "hotel lot", and the documents referred to above would show that by the time the first and second respondents lodged the respective Prohibitory Orders, the plaintiff had acquired the entire beneficial interest in the said property. Thus, since at the date of the registration of the Prohibitory Orders, Dunstan only retained a bare title to the said property, the first and second respondents as his judgment creditors could not seize and sell more than what Dunstan, the judgment debtor, was entitled to sell. The authorities cited in support

of the above proposition are *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 and *Chua Hee Hung v. Q.B.E. Supreme Insurance Bhd* [1990] 1 MLJ 480.

Unfortunately, the above submission did not find favour with the learned trial Judge. In dismissing the application, his Lordship stated as follows (p. 19 AR)

> What exactly do we have here? An attempt by the applicant/plaintiff (the transferor) to regain a piece of land after he had knowingly transferred it to Dunstan Dumpangol (the transferee) and such transfer had, with plaintiff's knowledge, led to the bank lending money to the transferee's company and which payment the transferee had guaranteed. Till today the loan remains unpaid. Was the transferor (applicant/ plaintiff) an equitable owner? Did he come with clean hands and a pure heart? The judgment in *United Malayan Banking Corporation Bhd. v. Goh Tuan Laye & Ors.* [1976] 1 MLJ 169 seems to support the 3rd Defendant's claims and that being so, 3rd Defendant can pass the title to the 4th, 5th and 6th defendants on the sale. At the date the Prohibitory Orders were registered, Dunstan Dumpangol had the legal and equitable interests in the land. Nowhere was the plaintiff featured in the transaction or loan between Dunstan Dumpangol and the 3rd defendant. How then could the 3rd defendant know of the interest or existence of the plaintiff when it provided the loan?
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> While it is trite law that a judgment creditor can only seize and sell what the debtor can lawfully sell (See *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116) here at the time the Judgment Creditor seized the land, the Judgment Debtor (Dunstan Dumpangol) was lawfully possessed of the whole piece of the land and so the land was adequately seized under the Prohibitory Order and then lawfully auctioned. Lee Hun Hoe, CJ (Borneo) in *Chua Hee Hung v. Q.B.E. Supreme Insurance Bhd.* [1990] 1 MLJ 480 at page 484 said: "In our view, since the Sabah Land Ordinance and the National Land Code are model led on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah ..." Mr. Nor Bert Yapp, of counsel for the plaintiff, in his submission in reply to 4th, 5th and 6th defendants claimed that the "Torrens System of indefeasibility does not apply to lands in Sabah." Although there is no vendor/trustee relationship here Mr. Yapp's assertion cannot be right as such a statement goes against the roots of what the Chief Justice of Borneo has ruled above.

After discussing *Karuppiah* and *Chua Hee Hung & Ors.*, the learned judge concluded:

> But in our instant case, the plaintiff had divested himself of his rights openly (by the transfer duly executed and registered) and then merely by way of an agreement, which was a private arrangement between two parties, he held back the land, to claim when he felt inclined to do so not caring whether by his earlier transfer, others are prejudiced or may lose their money or they be put to deep problems.

The appeal before us was basically against the above finding of the learned judge. However, the question which we had to decide was whether the "bare trust" principle applied to this case. Under the general law principles, "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser" (*Lysaght v. Edwards* [1875] 2 Ch D 499, Jessel MR. at p. 506). In *Chang v. Registrar of Titles* [1975] 8 ALR 285, Jacobs J. said that the bare trust should mean "no more ..... than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner." And Judith Sihombing in her book "**National Land Code - A Commentary**", second edition at p. 843 said that the effect of the bare trust was to alter the relationship of the parties from that of vendor/purchaser to that of trustee/beneficiary even though the nature of the

transaction was that of sale. There is a wealth of local authorities on the issue of bare trust on the sale of land. In *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224, Gill FJ said at p. 229 that "the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser".

In *Karuppiah*, the registered proprietor deposited his title with a lender as security for a loan. He then sold land to a purchaser, who had paid the purchase price in full and lodged a private caveat to protect his interest. When the vendor's judgment creditor tried to attach the land, the Federal Court held that the registered proprietor held as bare trustee for the purchaser who had paid the purchase price in full.

In *Temenggong Securities Ltd. & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 FC, the proprietor sold land to a purchaser whom he gave a transfer in registrable form and the issue document of title. The Government obtained a registrar's caveat preventing the registration of the transfer. The Federal Court held that as the proprietor had held as bare trustee for the purchaser at the time of the entry of the registrar's caveat, there was no interest of the proprietor capable of being affected by the caveat to protect the interest of the Government as against the proprietor Ong H.S. FJ stated at p. 47:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the land to the [purchaser] are bare trustees ...

In *Chua Hee Hung*, the appellants claimed to have bought the flats from Chu Yun and have paid the purchase price in full and subsequently went into occupation. The respondent obtained a prohibitory order against the said property. The appellants then applied for the prohibitory order to be set aside on the ground that Chu Yun had no saleable interest in the property. The Supreme Court held, following *Karuppiah* and *Temenggong Securities*, that although Chu Yun, the judgment debtor was the registered owner of the property, he was holding it as bare trustee for the appellants.

It should be observed from the above authorities that the "bare trust" principle applies to contract of the parties from that of vendor/purchaser to that of trustee/beneficiary (Judith Sihombing, *ibid*). In the present case, the said agreement is, however, not a contract of the sale of land and therefore no vendor/purchaser relationship exists. It is an agreement made between the co-owners of the land and an individual developer for the latter to develop the said land for commercial purpose. In consideration of the terms and conditions of the agreement, the co-owners transferred the land to the developer. One of the conditions was that the developer would transfer one of the lots in the said land back to the co-owners after the subdivided title had been issued. Clearly, by clause 11 of the said agreement, the relationship that existed between the parties must be merely contractual and did not create any trust relationship between them in respect of the said property. The remedy opened to the co-owners would be to sue the developer for breach of clause 11.

What is also plain to us is that the appellant's claim of being the beneficial owner of the said property under the said agreement is made on the basis of a constructive trust. It is trite that the onus lies on the appellant to prove that Dunstan held the

said property as his trustee (*Meriam binti Yaacob & Ors v. Shell Malaysia Trading Sdn. Bhd.* [1984] 2 MLJ 31. In this regard, Counsel relied only on clause 11 of the said agreement where he submitted that it was clear from this clause that it was the manifest intention of the parties that Dunstan was to hold the land as bare trustee for the co-owners pending the retransfer of the "hotel lot". However, as we have stated above, this clause did not create a trust relationship between the co-owners and Dunstan. We were satisfied that the appellant had not shown by cogent evidence the existence of a constructive trust. In the circumstances, the appellant's contention that Dunstan was his constructive trustee of the said property remained as a bare assertion.

It is also significant to remember that the rule that "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser" is not absolute because it is only applicable if specific performance of the agreement between the vendor and purchaser can be ordered by the Court. Otherwise, the trusteeship does not arise (*Warming ton v. Miller* [1973] 1 QB 877. The position in Sabah was stated by Lee Hun Noe C.J. in Chua Hee Nung (at p. 484) after referring to *Chang v. Registrar of Titles, supra*.

> In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah if specific performance is ordered by the High Court except so far as they are precluded from doing so by statutes ....

In the present case, the question here is whether under the terms of the said agreement, specific performance would be ordered by the Court at the instance of the appellant against the estate of Dunstan, deceased. The plaintiff was one of the six co-owners of the land who entered into the said agreement with Dunstan. Under clause 11, Dunstan agreed to transfer the "hotel lot" back to the first party which comprised the six co-owners as soon as the subdivided title of the said property was issued by the authority. Therefore, the proper parties to an action for specific performance would be the six co-owners and Dunstan. It would seem that if specific performance were to be decreed against the estate of Dunstan, deceased, under clause 11 or any other clauses therein, then, based on the facts, the Court would not order specific performance at the instance of the appellant since there was no evidence that the other co-owners had renounced their shares or assigned their rights in the property to the appellant.

For the above reasons, we were satisfied that both on the facts and law, the "bare trust" principle did not apply to the present case. Therefore, as Dunstan had retained legal ownership of the said property at the time of the registration of the Prohibitory Orders by the first and second respondents, the subsequent order of sale by public auction granted by the High Court Kota Kinabalu on 28 February 1989 was valid and proper

As regards the claim of the third, fourth and fifth respondents that they have acquired the title to the said property, which the confirmation of sale by the High Court had made their ownership absolute, the response of the appellant was as follows. First, it was submitted that the said auction sale of the said property to these respondents did not take away the rights of the appellant as the beneficial owner of the said property. This was because when the Court ordered the sale of the judgment

debtor's property, it could not sell more than what Dunstan the judgment debtor was entitled to sell. Counsel relied on *Karuppiah* and *Chua Hee Hung*. In our judgment, this argument no longer holds water in view of the reasons which we have given above.

Secondly, it was contended that the order of confirmation of sale dated 15 August 1985 did not bind the appellant because he was never made a party to the proceedings. Neither the order for sale nor the said order of confirmation was served on the appellant under O. 44, r. 3(1) Rules of High Court Counsel further submitted that it was never too late for the appellant to challenge the validity of the auction sale, relying on *Ker Chee Chuan v. Katlyn Enterprise (M) Sdn. Bhd.* [1991] 1 MLJ 98 SC. This case is, however, an authority for the proposition that as the provision of O. 47, r. 7(g) Rules of High Court and s. 337 NLC [1991] 1 ML J 98 SC 1965 in relation to an auction sale had not been followed, the issue whether the auction sale of the land by the Court was absolute was held to be contentious.

The facts of the matter were that the third, fourth and fifth respondents purchased the said property at an auction sale on 20 May 1989 at the Magistrate's Court Keningau. The auction sale of the said property was confirmed by the High Court Kota Kinabalu on 15 August 1989. Under r. 7(g)(i) of O. 47, such confirmation of sale becomes absolute unless an application was made under paragraph (e) or (f) or where such application was made and disallowed by the Court. It is further provided that no such order confirming the sale shall be made until after the expiration of one month from the date of the sale. Also, under O. 47 r. 7(e), any person whose interests are affected by the sale may apply to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale. In *Haji Yahaya bin Haji Ahmad & Anor. v. W.E. Perera & Anor.* [1977] 1 MLJ 32, the High Court allowed an application to set aside an auction sale of a piece of property holding that there was material irregularity in the sale in that the order for sale was improperly issued as the judgment debtor had no more interest in the land at the date of the order of sale. In the present case, the record showed that the appellant did not apply to set aside the order for sale of the said property within one month from the date of the sale. In fact, a letter dated 6 - October 1987 (HCH-1) to the appellant's solicitors should serve sufficient notice to them of the existence of the Prohibitory Orders on the issue document of title to the said property. The logical thing to do would be for the appellant to intervene in the proceedings and file an application to set aside the Prohibitory Order or apply for a stay of execution pending the decision in *Chua Hee Hung*. The record also showed that the appellant or his solicitors never made any attempt to find out from the solicitors of second respondent regarding the sale of the said property by public auction. Public notice of the proclamation of sale of the said property was advertised in the Sabah's Daily Express on 6 and 19 May 1989 respectively.

From the fact and circumstances which we have highlighted above, we were satisfied that the auction sale and the subsequent order of confirmation of the sale were valid.

For reasons we have stated, we dismissed this appeal with costs. Deposit to account for taxed costs.